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Because of the diverse conditions of humans, it happens that some acts are virtuous to some people, as appropriate and suitable to them, while the same acts are immoral for others, as inappropriate to them.

Saint Thomas Aquinas, *Summa theologiae*

Introduction

Sex as a purely biological function normally falls outside the purview of social scientists. Cultural historians look at the meaning of sex in variant societies, times, and places as an indication of what was acceptable (or unacceptable) behavior. Jeffrey Henderson's attitude is typical, "That the same two sex occur in every society is a matter of biology That there is always sexuality is, however, a cultural matter Sexuality is that complex of reactions, interpretations, definitions, prohibitions, and norms that is created and maintained by a given culture in response to the fact of the two biological sexes."¹ The contemporary definition of "sexuality" is a construct of nineteenth century Western, industrialized societies, categorizing people based upon well-defined sexual characters and desires.² Michael Foucault asserts that the nineteenth-century obsession with debating sex-related topics has no parallel in the ancient world. Foucault

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¹ Henderson 1988: 1250.

² Halperin 1989.

examines why modern people perceive their desires as troublesome and the Greco-Roman context in which desire was not an emotional conflict.³ A study of ancient Roman law concerning sexual behavior requires an understanding of the importance and centrality assigned to sex in the classical world.

Laws alone are not a thorough indication of social mores, values, and behavior. Social prescriptions are often manipulated, not observed, or part of a concealed program. However, these laws were the means by which communities pronounced, analyzed, and managed deviance. A detailed examination of the Roman legal foundation debases the presumed, general condemnation of homosexual acts from 326 B.C. to 544 A.D. Recent scholarship concerning sex-history maintains that ancient societies classified acts, not persons, and "the homosexual" is a modern invention.⁴ In classical society, scrutiny or privately initiated lawsuits could charge a male citizen with neglecting his social responsibilities but would not, for example, ban him from the military.

In the earliest recorded cases, sexual deviance itself was not actionable in court. The crime was the

³ From the discussions of both: Foucault 1985 and Foucault 1986.

⁴ A person who practices only same sex acts and is part of a recognized societal minority. McIntosh 1969, Weeks 1981, and Epstein 1987.

contravention of the normal character or status of an individual.⁵ This contravention was referred to as *stuprum* or disgrace.⁶ The formula for propriety was not based upon the difference/sameness of genders but the dominance/submission of the persons involved. As David Halperin says, sex was perceived in terms of "either act or impact," giver or receiver, donor or recipient.⁷ John Winkler warns that when studying the protocols of ancient systems one must recognize the limitations on their implementation and conformance. According to Winkler, in these laws, "intent contains a fair amount of bluff, of saving face: they regularly lay down laws which are belied by the jokes those same men will later tell."⁸

It must be acknowledged that there is no tangible evidence as to the conspiratorial thoughts and disingenuous actions behind legislation. The history of Roman law and *stuprum* from the earliest recorded cases found in the writings of Valerius Maximus, through the mystery of the *lex Scantinia*, the Republican and Augustan Ages, and the moral legislation of the Christian Era, reveal

⁵ For example, creditor and debtor or a citizen and prostitute. Halperin 1989: 94-8.

⁶ Adams 1982: 200.

⁷ Halperin 1989: 30

⁸ Winkler 1990: 70.

a plurality of attitudes about sexual behavior. The earliest cases involved the violation of class or status norms while Augustan legislation considered same-sex acts and adultery worthy of capital punishment because they were socially and biologically unproductive.

Christian attitudes reflected this later Roman legal tradition regarding homosexuality. The Christian emperors Theodosius and Justinian followed the Augustan model and justified it with religious dogma. Roman law has directly influenced American and European civil and criminal law just as it has influenced Christian canons regarding homosexuality.⁹ The undeniable influence of this tradition has helped to shape modern popular treatment of homosexuals as social deviants.

⁹ Bullough 1979: 31.

Chapter One

The Earliest Record

The history of Roman laws concerning homosexuality is dependent upon the reliability of legal and historical sources.¹ There was no detailed, uniform system for legal record keeping in ancient Rome. The stewardship of records was generally the responsibility of *pontifices*, but records were also kept in various temples or under the supervision of other priests, scribes, and *aediles*. As keepers of the ancestral tradition (*mos maiorum*), members of the hereditary priesthood were consulted about all manner of precedents, including legal. This is central to the discussion of the *lex Scantinia* in Chapter 2 and the legal influence wielded by *pontifices*.

According to Richard Mitchell, "the wide variety of private and distinct archival material" made the writing of

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¹ The introduction of this chapter is a discussion of record keeping based upon: Mitchell 1984.

Rome's earliest history difficult for ancient authors.² Discrepancies in descriptions, chronology, and language obscured specific details as well as the relationships between events. Roman priests did not maintain records to establish a chronology of Rome's historical development, but rather to underscore the wisdom of previous generations, the *mos maiorum*.

In the third century B.C., Roman authors began to employ these records in their interpretations of Rome's historical development. Different interpretations, frequently resulted in two versions of the same event becoming separate events. Even highly regarded accounts may perpetuate the misinformation based on a single, unreliable source. The lack of chronological information made it difficult to date individual legal cases. To create a chronological discussion of cases involving homosexual conduct one must draw upon Livy, Dionysius of Halicarnassus, and Valerius Maximus. The differences between these sources are as important as their commonalities. Their differences reflect source and historical context while their commonalities establish the history of homosexuality in Roman society and law.

² Mitchell 1984: 549.

The first century historian Valerius Maximus compiled Memorable Deeds and Sayings, during the reign of the Emperor Tiberius. Valerius acknowledged his intent, procedure, and readership in the proem:

The memorable deeds and sayings of the city of Rome and of foreign nations, which have been so scattered in the works of authors that they cannot conveniently be learned, I have resolved to select from outstanding authors so as to spare those who want concrete evidence the tedious task of research. I have not succumbed to the desire to treat all things. For who can consider the history of the world in a few volumes? Or who in his right mind would hope that he could write Roman and foreign history with greater accuracy or eloquence, so polished as it has been by our elders?³

Valerius' work shared the ironic themes of a tribute to the precedents of Augustus and an allegiance to the republican past.⁴ Valerius codified popular declamations which had grown too large in content for memory. These writings did not simply reflect memorable moments but created a hierarchy of morals, values, and behavior.

³ Bloomer 1992: 14.

⁴ Valerius has been accused of plagiarism by a variety of scholars including: Klotz 1909 and Bosch 1929. I recognize this and use Valerius as a synthesis of multiple, uncited sources.

Valerius interpreted historical events and reported on a new generation of Roman aristocratic culture. Proper behavior and respect of status, role, and responsibilities is a theme through all of Valerius' books. Books two through six present distinct moral models.⁵

The sixth book contains twelve of the earliest known sexual crimes.⁶ The fact that an equal number of heterosexual and homosexual crimes are reported shows that homosexuality, as such, was not alone an offense but an element of *stuprum*. This thesis reorganizes these cases chronologically in order to present a linear development of sexual misconduct. The earliest recorded crime dates to the time of the Second Samnite War and involved the familiar theme of a creditor's abuse of a debtor. According to Valerius (6.1.9), T. Veturius Calvinus, the youthful Roman son of a consul, was indebted to and abused by his creditor, P. Plotius. Livy (8.28) and Dionysius of Halicarnassus (16.5) both relate similar incidents but disagree with Valerius Maximus and each other regarding specific names and dates.⁷ Dionysius and Valerius both cited capital punishment as the penalty for the creditor's actions.

⁵ Bloomer 1992: 1-28.

⁶ I will not be dealing with mythological or legendary accounts (i.e. Lucretia, etc.).

⁷ Lilja 1983: 106.

Valerius' narrative suggests that citizens should have been free from sexual violations regardless of their indebtedness.⁸ Livy and Dionysius placed little emphasis on the homosexual advances of the creditor. Instead, they stressed the incongruity of a freeman being treated inappropriately because of his financial obligation. We know of similar cases involving soldiers who returned to Rome and were indentured to their creditors for their outstanding debt. They were known as *nexi*, and we are told they suffered at the hands of their creditors but did not lose their free status. Livy (8.28) and Dionysius (16.5) ended their accounts by citing the enactment of the *lex Poetelia Papiria de nexi* which outlawed debt enslavement.⁹

Valerius Maximus (6.1.11) placed the second crime within the context of the Third Samnite War (298-290 B.C.). The military tribune, M. Laetorius Mergus was brought to trial by a plebeian tribune, before the *comitia tributa*, on a charge of *stuprum*. Dionysius (16.8) said that Laetorius attempted to seduce this beautiful young man with "gifts and great acts of charity."

⁸ *Nexi*, were bondsmen and were treated only moderately better than slaves.

⁹ Varro LL 7.105 dates the *lex Poetelia* to 313 when a son of Poetelius was Dictator. Broughton 1951 (Vol. 1, 146-147, 151-152) explains the discrepancy between Livy and Varro by assuming that the Poetelius, Consul of 326, was also the Dictator of 313 and the son of the Consul of 360 and 346. The name of the law probably gave rise to the creditor's name in Livy's version. See Rotondi 1990: 230.

Laetorius committed suicide and was posthumously found guilty of *impudicitiae* by the *comitia*. Laetorius' advances were unsuccessful but his overt abuse of power during wartime was particularly reprehensible. Livy did not mention the incident and Dionysius (16.8) recorded Laetorius' first name as C. rather than M.

According to Valerius Maximus (6.1.7), the third case involved the advances of C. Scantinius Capitolinus against the son of M. Claudius Marcellus. In 226 B.C., Marcellus, *curule aedile*, had Capitolinus brought before the *comitia tributa* and charged with *stuprum*.¹⁰ The offense was that Capitolinus used his status as an adult (and plebeian tribune) to abuse an inferior, young boy. His cavalier actions arrogantly trusted in the sacrosanctity of his plebeian tribunate. Valerius remarked that the young, timid Marcellus was too ashamed to testify and this modesty influenced the *comitia* in its investigation (*pudicitiae quaestio*). Capitolinus was found guilty and fined for his actions.

A fourth case involved C. Cornelius, in an incident dated to the period after the Third Punic War. Valerius Maximus (6.1.10) portrayed Cornelius as a highly decorated war veteran who committed *stuprum* and was

¹⁰ Bullough 1976: 137.

imprisoned by C. Fescenninus, *tresviri capitalis*. Cornelius admitted his offense but appealed to plebeian tribunes citing the unnamed boy's status. His plea was based on the fact that, *ingenuus adulescentula*, did not have the protective rights of a freeborn citizen. Cornelius was prosecuted and imprisoned because his actions were unbecoming a veteran. The *tresviri capitalis*' discovery of the incident reflected its public nature and the *stuprum* of C. Cornelius.

The fifth incident involved the murder of C. Lusius by one of his soldiers during a battle with the Cimbri to 104 B.C. The soldier is named C. Plotius by Valerius (6.1.12) and Trebonius by Plutarch (Life of Marius 14.4-8). The case, as Plutarch detailed, was complicated by the fact that Lusius was the nephew of C. Marius, the commander in chief against the Cimbri. In the case, the young soldier murdered his superior who had made sexual advances towards him. The youth ably defended himself against the charge of murder, and his acquittal and subsequent virtuous praise by Marius affirmed the case as an example to be later modelled in rhetorical presentations.¹¹

¹¹ For example: Cicero, *Pro Milone*, 4.9.

The sixth and final crime involving homosexuality recorded by Valerius (6.1.5) is also dated to 104 B.C. The censor Q. Fabius Maximus Servilianus went into voluntary exile after executing his son, Eburnus, for moral offense. This offense is construed by scholars to mean *stuprum* involving homosexual acts. Valerius' account reinforces this theory by following it in his original writings with a case involving similar circumstances but heterosexual acts.

An understanding of the criminality of these cases requires an initial review of the basic details of the six aforementioned. Fundamental themes serve as evidence for interpreting societal values and governmental policy with regards to sex acts between men in lieu of extant legislation. The case of P. Plotius and T. Veturius Calvinus is the oldest recorded case regarding same sex acts as an element of *stuprum*. The accounts of Livy and Dionysius of Halicarnassus focused on the creation of the *lex Poetelia Papiria de nexi* as the direct response to this case. These sources did not pass moral judgement upon homosexual acts, as such, but rather focused on *stuprum*. John Boswell observes, following closely Livy and Dionysius: "The Roman populace was stirred to anger not by learning that the master had any sexual interest in the boy but by

seeing the whip marks on the back of a Roman citizen; it was clearly the physical abuse of a citizen which invited retribution." ¹² Boswell recognizes that homosexual rape of one's slaves was not illegal, and nothing he finds in Livy or Dionysius of Halicarnassus refutes this.¹³ Masters had virtually unrestricted power over their slaves. T. Veturius Calvinus became a *nexus*, abused by his creditor, because his military service abroad had forced him to borrow to pay the burial of his father.¹⁴ An intertextual theme is the misuse of a superior position and the transgression of the benevolent patron/client relationship to one of creditor and debtor. The capital punishment recorded by Valerius and Dionysius reflected the high level of disdain with which the abuse of a subordinate was regarded.

Military relations played an important role in three of Valerius's accounts. Soldiers were unable to maintain their Roman farms and as a result became indebted to superiors. The actions of Capitolinus violated the superior/inferior roles and his position as tribune. The case of Laetorius Mergus also occurred during wartime and was met with such vehement disapproval that he was

¹² Boswell 1980: 64.

¹³ Masters had complete control over their own slaves but might be guilty of illegal action with the slaves of another.

¹⁴ T. Veturius Calvinus was consul in 321 B.C. (surrendered at Caudine pass).

censured by the *comitia*. The third incident involving military relations concerned Cornelius, a distinguished veteran who claimed that his act was with an *ingenus adulescentula*. Cornelius' actions were *stuprum* and unbecoming a veteran.

It is significant to note that Romans were equally severe in their punishment of heterosexual crimes. Martin Hoffman acknowledges the judicial principle of equality between sex crimes regardless of orientation: "what is illegal are certain acts, and the law does not discriminate in regard to the sex of the individuals who perform these acts, which are illegal in both a homosexual and a heterosexual context."¹⁵ Sexual interaction between slaves and their masters was acceptable. The incidents recorded by Valerius Maximus, Livy, and Dionysius of Halicarnassus are dated from the fourth to the second century B.C. Legal cases involving *stuprum* in a homosexual context continued to exist through the city's history.

¹⁵ Hoffman 1972: 121-136.

Chapter Two

Mystery of the *Lex Scantinia*

The *lex Scantinia* is the law most widely recognized as legislating against the *stuprum* represented by the six cases discussed in Chapter One. There is no surviving primary text regarding the *lex Scantinia*. Its origins, purpose, and evolution are veiled in mystery. Changing interpretations of what the *lex Scantinia* might have been were more than just the result of shifts in community standards. The extant record allowed for reinterpretation for religious, political, and moral agenda. The history of the *lex Scantinia* spans the Republic, Empire, and Christian eras. Attempting to understand a law which is considered by many modern scholars to be the quintessential, Pre-Christian, Roman legislation against homosexual *stuprum* requires an examination of the literary references and controversies concerning it.

The Encyclopedic Dictionary of Roman Law and the Oxford Latin Dictionary refer to the *lex Scantinia* as a law against *stuprum cum masculo* or unnatural vice.¹ The penalty for violating this statute was ten thousand sesterces according to most Roman legal experts.² Because the original text does not survive the first great controversy regarding the *lex Scantinia* is the spelling of its name. The spelling is crucial to understanding the history of the correct law and its course through time.

The controversy regarding the spelling of the law involves the difference between Scantinia and Scatinia. Numerically, Scantinia, is found more frequently in literature than Scatinia. Both Valerius Maximus and Gaius Suetonius Tranquillus refer to the law using the spelling Scantinia. It is more possible that careless copying of the law would have caused its name to change from Scantinia to Scatinia. The argument that Cicero referred to a *lex Scatinia* in Phillipics (3.6.16) is based upon incorrect transcripts. Instead, Cicero referred to the *lex Atinia*.³ A more plausible reason for supporting the spelling of

¹ Berger 1991: 559; Glare 1976: 1699.

² Berger 1991: 559.

³ The *lex Antinia* of 197 B.C. prevented the ownership of stolen property being acquired by long possession (*usucapio*). Ker 1957: 204.

Scatinia is a reference in Liv. Epit. Oxyrh. (1.50.116) to a Scatius involved in a case of *stuprum*. However, the evidence supporting the spelling Scantinius is more plentiful, reliable, and generally accepted.

The *lex Scantinia* is most often dated to 226 B.C., the year C. Scantinius Capitolinus was tried for making sexual overtures towards Marcellus' son. This widely accepted assumption that the law was named for the accused is without sound precedent in Roman legal history. Statutes were most commonly named for the person proposing the law. There is no evidence of any statute named for a defendant in any notable case.

J. Friedrich Christ, places the law within the Second Punic War (218-201) citing *tum enim florebat Scatiniorum gens plebeia*.⁴ This argument supports the spelling of Scatinia as does Rotondi's assertion that the law is the result of a 149 B.C. incident involving a man named Scatinia recounted in Liv. Epit. Oxyrh. (1.50.116).⁵ Bernay-Vilbert also cites the 149 B.C. date but incongruously refers to the 226 B.C. Scantinius case as somehow related.⁶ The date of the legislation is closely related to the spelling, but neither of these choices are

⁴ Christ 1727: 9.

⁵ Rotondi 1990: 293.

⁶ Bernay-Vilbert 1974: 446.

convincing. The case for 226 B.C. violates the recognized legal precedent of naming a case for the proposer while 149 B.C. requires the law's spelling to be Scatinia and is only cited in a single, unreliable source.

Christ may have been correct in placing the legislation within the Second Punic War. Broughton notes a pontiff named P. Scantinius who lived in 216 B.C. and was succeeded by Q. Caecilius Metellus (Liv. 40.45.8-46.10). At the same time there was a pontiff named L. Cantilius who was flogged to death for violating a Vestal virgin.⁷ This incident reflects a social context condemning of sexual misconduct. Martial law during wartime tends to restrict the actions of people and foster government involvement in issues like sex, normally within the realm of personal moral, ethical, and religious codes of conduct.

Recent scholarship regarding the rights and responsibilities of pontiffs may explain the origin of the *lex Scantinia*. During the third century, pontifices were at the pinnacle of their influence and power, and were likely choices for membership in the Senate. Secular and religious affairs were closely allied, as the *auctoritas* of pontiffs rested in their charge as record keepers of the law. Their responsibilities included the legal record and

⁷ Broughton 1951 (Vol. 1): 252.

frequent alterations were made to it. The priest's ability to write was a sacred skill which set them above the illiterate, secular masses.⁸

P. Scantinius, a pontiff in 216 B.C., could have proposed the *lex Scantinia* with reference to legal precedent. Sir Ronald Syme states, "The Romans as a people were possessed by an especial veneration for authority, precedent and tradition, by a rooted distaste of change unless change could be shown to be in harmony with ancestral custom . . ."⁹ P. Scantinius, as a legal record keeper, could have exerted senatorial authority by presenting a statute which he could cite as representative of the legal tradition. It is likely that he would have referred to the 226 B.C. case of Scantinius Capitolinus for his legislation.

However, because the original text does not survive, sources assume that it was restricted to *stuprum*. P. Scantinius may have proposed the law in censor of his fellow pontiff L. Cantilius, as his act against a Vestal qualified as *stuprum*. A statute against his actions by P. Scantinius would have created a law spelled *lex Scantinia* which imposed a fine upon a perpetrator of *stuprum*. The case of Scantinius Capitolinus was not necessarily invoked

⁸ Mitchell 1990: 68 - 72.

⁹ Syme 1960: 315; cf. Syme 1986: 6.

as a precedent for this legislation. P. Scantinius would have referred to many cases involving *stuprum* and did not rally against homosexual acts specifically. The link between homosexual conduct and the *lex Scantinia* was created by the evolution of the word *stuprum*. The word *stuprum* evolved into a specialized term for disgrace in the context of sexual deviance. The disgrace was not exclusively homosexual or heterosexual but was an unsanctioned sexual act, adultery, or rape.¹⁰ Cases such as that of C. Cornelius complement the hypothesis that the law was against *stuprum* because he was prosecuted not for his homosexual acts but for his behavior, a violation of his status and unbecoming a veteran.

Some Roman legal historians who believe that the *lex Scantinia* prohibited *stuprum* in the context of homosexual acts carrying with it a fine of ten thousand sesterces cite the following passage from Quintilian's *Institutio Oratoria*: *ingenuum stupravit et stupratus se suspendit; non tamen ideo stuprator capite ut causa mortis punietur, sed decem milia, quae poena stupratori constituta est, dabit* (4.2.69). The significance of a passage which does not explicitly refer to the *lex Scantinia* is questionable.

¹⁰ Adams 1982: 201.

The *stuprator* of the youth, from the quotation above, was liable and received the fine of ten thousand sesterces. The boy's suicide implied that he was young and had been raped. Boswell supports the rape theory as his actions were too drastic for one who had consented.¹¹ Homosexual relations with ones own slave were condoned and male prostitution is assumed to have been legal as it was taxed during this period.¹² Therefore, the law to which Quintilian referred must have protected *ingenuus* from forcible violation.

Quintilian lived one hundred years after Augustus and never in any of his writings did he specifically mention the *lex Scantinia*. The two earliest surviving textual references to the *lex Scantinia* were by M. Caelius Rufus in his letters to Cicero, who was serving as *proconsul* in Cilicia. In 50 B.C., Caelius was *aedile* and in letters 12 and 14 in Cic. ad Fam. 8 he incorrectly referred to the law. The allusions in both letters involved Appius Claudius Pulcher and his financial dealings with Caelius. Caelius meant to discuss the *lex Atinia* in his writings to Cicero, instead of the *lex Scantinia*. (see note 3, page 17) These are the only known explicit references to the *lex Scantinia* in the entire Republican and Augustan periods, and there are no

¹¹ Boswell 1980: 67.

¹² McGinn 1989: 86 - 87.

homosexual allusions in either letter. While Cicero commonly used homosexual innuendoes in his orations to cast a shadow of *stuprum* upon a trial opponent, he never mentioned the *lex Scantinia*.

In the early second century Suetonius referred to the *lex Scantinia* in his biographies of emperors. Suetonius cited Domitian's moral condemnation: *quosdam ex utroque ordine lege Scantinia condemnavit* (8.4). The passage's sexual implications were affirmed by an allusion to adultery which preceded it and one concerning the violation of Vestals which followed it. There is no evidence as to whether the crime was homosexual in nature. Boswell recognizes this utilizing Domitian's own sexual orientation as evidence that he would not have prosecuted someone for homosexual acts.¹³ Domitian's affection for Earinos was widely known but did not necessarily instill a tolerance in the emperor.¹⁴

Not long after Suetonius' account, Juvenal mentioned the law in his Satire 2. The satire chastised various forms of immorality. A literary allusion to a homosexual affair was followed by a legal citation: *quod si vexantur leges ac iura, citari ante omnis debet Scantinia*.

¹³ Boswell 1980: 67.

¹⁴ Domitian's relationship with Earinos was publicly praised by Statius (Silv. 3.4) and Martial (9.11 - 13.16.36).

This linking of homosexuality and the *lex Scantinia* was undeniable. However, the exact nature of the law is still unclear. Suetonius referred to a sexual crime while Juvenal mentioned homosexuality but neither discussed the punishment inflicted on the trespassors of the Scantinian law.

The final three references to the *lex Scantinia* were during the Christian era. The earliest, Tertullian's Monogamy (12.3), discussed the negative popular reaction to the immoral lifestyles of bishops who transgressed the *lex Scantinia*. The reference is not explicitly homosexual but is sexual as it is preceded by an allusion to digamy. The fourth century commentators on the *lex Scantinia*, Ausonius and Prudentius, lacked the legal training of Tertullian. Bailey comments that neither Ausonius nor Prudentius stated whether the law was still valid during their lives. Its inclusion, and lack of explanation on the authors part, implies that the fourth century readership had at the very least a recognition of the name, *lex Scantinia*, if not a general understanding of the law.¹⁵ Prudentius proposed that if Jupiter was tried under Roman

¹⁵ Bailey 1975: 65.

law, *laqueis minacis implicatus Iuliae luat severam victus et Scantiniam* (Peristeph. 10.203). The *lex Julia de adulteriis* prohibited adultery recognizing both heterosexual and homosexual transgressions as illegal. The *lex Julia* and the *lex Scantinia* were also paired together in an epigram by Ausonius (92). Ausonius described a husband who refused to divorce his wife for her adulterous behavior as prescribed by the *lex Julia*. The *lex Scantinia* is then linked to a *semivir* which is either a castrated or effeminate man who symbolized the disdained, sexually passive homosexual partner.¹⁸

Tertullian was part of a Christian movement which reacted against what they believed were practices of pagan immorality. Homosexuality was considered a Roman perversion. When Ausonius and Prudentius wrote in the fourth century, Christianity was already the state religion. They lacked the harsh criticism of Tertullian and used more satirical and moderate commentary to complete their analyses. All three Christian writers agreed that the Scantinian law was harsh and worthy of fear but did not detail any punishment for violation.

The mystery of the *lex Scantinia* is difficult to unravel without the original text. Boswell maintains that

¹⁸ Definition given in: Lilja 1983: 119.

Domitian used the *lex Scantinia* to protect minor males from castration or prostitution against their will. Boswell uses the Epigrams of Martial as evidence by citing the allusion of a law forbidding the prostitution of infant males in 9.8 (lines 3 - 5). The prohibition of castration was a common theme in Martial's poetry as it is utilized in 9.6, 9.8, and 2.60. All of these poems forbid the castration of slaves. In epigram 6.2, Martial referred to the law of castration linking it with the *lex Julia de adulteriis* thereby extending the prohibition of castration to freeborn males. This linking is reminiscent of Ausonius' use of the term *semivir* when discussing the *lex Julia* and the *lex Scantinia*. *Semivir* can be used to refer to a castrated man. It is therefore possible that this law was Domitian's legislation against castration.

It has been conjectured that the unnamed law referred to in Quintillian's writings was the *lex Scantinia*. Bailey remarks that "the jurists of the third century were enlarging the scope of the *lex Julia de adulteriis* by their interpretative commentary, so as to make it applicable also to male homosexual practices - principally, it would seem, with the object of affording legal protection to minors."¹⁷ Boswell rightly argues that if there was a law

¹⁷ Bailey 1975: 68.

prohibiting homosexual relations there would have been no need to expand the scope of the *lex Julia*.¹⁶ However, the law protecting freeborn males which Quintilian referred to could have been repealed. During the two centuries which separated Ausonius and Prudentius from Quintilian, the law may have become dormant and eventually obsolete.

The mystery of the *lex Scantinia* will continue. However, the recognition of a pontiff's ability to legislate and his responsibilities and privileges as record keeper and protector of the legal tradition reveals a strong argument for dating the original law to 216 B.C. Subsequent invocations of the *lex Scantinia* recognized only its general outline as legislation against *stuprum* in the context of moral deviation from the accepted, contemporary social norms. Norms change and the statutes which enforce them are altered in response. The *lex Scantinia* reflects this and its history adds to a complete understanding of homosexuality in ancient Rome.

¹⁶ Boswell 1980: 71.

Chapter Three

From the Republic to the Empire

Homosexuality is believed by some to have caused a moral decline which eventually led to the "fall" of the Roman Empire. The Republic is viewed as an age of higher ethical standards of conduct. There is only scant evidence supporting these theories. The quantity of references to homosexuality in imperial literature is due solely to the fact that there is a greater amount of information regarding life in general during the Empire. Proportionately, there is not significantly more testimony regarding homosexuality during the Empire. However, pre-imperial sources such as Polybius and Cicero are more dependable than the imperial likes of Suetonius and Lampridius.

Male prostitution was indeed legal during the Republic. Cato, making a speech in the second century B.C., complained that prostitutes were more precious than farm lands. He suggested that male courtesans, like caviar, were a legal luxury disproportionately more expensive

than plowmen (Polybius 31.25). Cicero noted that Clodius was often accompanied by male courtesans, not to accuse him of illegality, but to blacken his reputation by discussing his indiscretion (Pro Milone 21 [55]).

There is one notorious legal case which possessed the scandal of sex and the intrigue of politics and it is cited by many as representative of a homosexually decadent age. Lucius Quinctius Flaminius, former *censor*, was expelled from the senate in 184 B.C. His offense was ordering a man murdered at a banquet for the pleasure of his lover. There are two different accounts regarding the identity of this lover. Livy said it was a male prostitute of noble lineage (39.42.5) while the other maintains it was a female prostitute.¹ Livy gave no hint of illegality regarding the homosexual relationship. He recognized that both versions of the case are "alike in lust and cruelty." Valerius Maximus only reported the heterosexual version in his writings. Had this relationship been illegal, it is highly doubtful that Flaminius' biographers would not have mentioned this. Livy placed no significance on the sex of Flaminius' companion instead,

¹ Livy 43. 1ff., and in Valerius Maximus 2.9.3 Cf. Cicero *Cato Maior* 42. Livy's phrase could mean "notorious prostitute" rather than "noble," since in his time *nobilis* meant both "well born" and well known," but a like usage in Valerius Maximus (9.1.8), where *nobilis* must mean "noble," supports the first interpretation of the meaning in this passage as well.

cited the "savage and horrible" murder as reason for expulsion (39.43.4-5).

The final Republican reference to be discussed involves a military law. Polybius reported that the Roman army punished those soldiers who "abused their bodies." It is not definitive, but quite possible, that Polybius was referring to homosexual acts. The verb *parachraomai*, is not necessarily sexual as it can mean "to misuse" or "to abuse." The military context would have made such actions subject to capital punishment.²

The legality of male prostitution is assured from the imperial tax collected from it.³ Severus Alexander (235 A.D.) used the income from these taxes to restore the Circus, Amphitheatre, and Stadium. Jasper Griffin says that these boys were given their own legal holiday.⁴ The sexual climate can be measured by the writings of Martial who frequently cited the names of prominent Roman citizens and their male lovers. Martial himself admitted to having participated in such activities though he stated that his books did not reflect his moral character (1.4, 11.15; but cf. 12.65).⁵

² Hist. 6.37.9; cf. Walbank 1957: 720.

³ McGinn 1989: 86.

⁴ Griffin 1976: 102.

⁵ Morality should not be equated to legality and Martial's character was under attack for the quality of his works of literature rather than his sexual habits.

Livy discussed the very negative bias against adult men who accepted the passive sexual position (39.13.10). This action risked a loss of status for the perpetrator and quite possibly qualified as *stuprum*. Such passivity was only tolerated when exhibited by voluntary slaves, non-citizen adults, and foreigners. Sexual passivity was often linked to political powerlessness. This is because those who did play the passive role represented people excluded from the political structure. Boys, women, and slaves were often exploited because of physical or economic hardship. This distressed the Romans who believed they were in full control of their Empire.⁶

It is uncertain whether the *lex Scantinia* had disappeared or was simply not invoked because there was other legislation. The *lex Julia de adulteriis coercendis* (c. 17 B.C.), is the most significant piece of Augustan legislation concerning sex acts. In this law homosexual intercourse fell under *stuprum*, disgrace and defilement, as did sexual relationships with free, unmarried girls or widows.⁷

⁶ Stories of homosexual rape were popular in sources such as Valerius Maximus. Legislation was passed during the late-Empire against passivity by citizens while exempting those violated by brigands or enemies (Digest 3.1.1.6).

⁷ This law did not apply to acts with those registered as prostitutes.

Augustus was concerned that sexual immorality threatened the sanctity and fruits of the marriage bond.⁸ There was no particular bias toward either heterosexual or homosexual violations. The law, part of a series of laws for moral reform supported by Augustus in the first century, was to encourage men between 25 and 60 to marry and become parents.⁹ The original punishment for *stuprum* had been a fine, but Augustan law now changed with the punishment.¹⁰

The scope of the law increased with the interpretation of jurists. Augustus supported this by stating that the opinions of jurists should be sought and announced. Hadrian believed that the consensus of eminent counsel should be followed like law. Gradually, this collection of judicial literature began to command legal authority, augmented by imperial edicts and rescripts. The *lex Julia*, most likely legislated against *stuprum* but how this was defined allowed for a change in the law.

⁸ Williams 1962: 32.

⁹ Last 1934: 451-455.

¹⁰ Polybius, *The Histories*, 6.37.9; Valerius Maximus 6.1.3; *Scriptores historiae Augustae*, Magie 1953: 24. Alexander initially attempted to abolish prostitution but recognized that it would be practiced in secret thereby losing the revenue possible through a tax. In the Institutes, 5th ed., 4.18.3, translated by Moyle 1913 it is said that the *lex Julia* condemned perpetrators to death. This is a later development of the law.

Papinian maintained that *stuprum* was a sexual act with a virgin or a widow in contrast to a married woman.¹¹ Herennius Modestinus went beyond Papinian by extending the definition of *stuprum* to include same-sex acts with boys.¹² Julius Paulus, a contemporary of both, stated that *stuprum* concerned the entanglement of any boy seventeen years of age (or younger) with an adult. Violation was subject to capital punishment¹³ if the act was *perfectus* or exile to an island if it was *imperfectus*.¹⁴ The difference seemed to be between acts which were completed and those only attempted. Marcianus' annotations upon Papinian's treatise, *De Adulteriis*, are evidence that the scope of the law developed. He said that the prohibition of adultery also censured anyone who knowingly lent their house for the committing of *stuprum cum masculo*. This was rule against the violation of boys.¹⁵

Slaves did not share the same protection and were subject to sexual abuse by their owners.¹⁶ Slaves used for

¹¹ Digest 48.6.1.

¹² Digest 48.34.1.

¹³ *Puniuntur capite* did not necessarily mean death but meant the deprivation of liberty, citizenship, or life. It is uncertain which is intended here.

¹⁴ Sent. 5. 44. 14 = Digest 47. 11. 1.

¹⁵ Digest 48. 8.

¹⁶ Until the third century force was allowed in obtaining sex from slaves (Digest 47.10.9.4).

homosexual acts were common in classical literature.¹⁷

The rights of freedmen, especially *nexi*, is unclear during this period. The Elder Seneca, recounts a case in which a freedman was charged with serving as a concubine to his master (*Controversiae* 4). His lawyer stated, "sexual service is an offense for the free born, a necessity for the slave, and a duty for the freedman."¹⁸

As an aside, it is interesting to note that there is very little information concerning lesbianism. This is primarily because most Roman historians were men. Gay male writers wrote about taking men as lovers while heterosexual historians favored accounts of female lovers. Both the Elder Seneca and Martial pointed out that lesbian acts were adulterous. The Elder Seneca noted that women caught during such an act were subject to capital punishment.¹⁹

Explicit legislation against homosexual behavior did not appear until the third century A.D. Prohibitions of same-sex marriages and the statutory rape of minors were included.²⁰ Homosexual acts not covered by these

¹⁷ Ex. Martial, 1.58; 2.43; 5.46.

¹⁸ "Impudicitia in ingenuo crimen est, in servo necessitas, in liberto officium."

¹⁹ Martial 1.90; 7.67, 70; the Elder Seneca, 1.2.23.

²⁰ Digest 47.11.1.2; 48.5.6.1, 34.1; 50.16.101.

laws most likely remained legal until the sixth century when Christian morality opposed all homosexual relations.²¹ Homosexuality evolved from *stuprum* to explicitly and morally reprehensible activity and would never again be accorded the same toleration it had in early Roman history.

²¹ Procopius *Anecdota* 11.34-36 and Justinian *Institutes* 4.18.4.

Chapter Four

The Legislation of Morality

Christianity ushered in an age of legislation which detailed homosexual acts as explicitly immoral and worthy of recrimination. This age of legal scholarship is particularly important because it has directly influenced American and European civil and criminal law just as it has influenced Christian canons regarding homosexuality.

These systems do not follow a general, ethical condemnation associated with *stuprum*, but instead share the harshness and specificity of the Christian imperial laws. These laws were based upon biblical teachings which were manipulated for contemporary social circumstances. Imperial edicts prescribed the moral path to salvation. It is therefore important that one understand this final development in the Roman legal tradition.

In 342 A. D. Constans¹ and Constans established a law which addressed homosexuality:

COD. THEOD. 9.7.3 (= COD. JUST. I.N. 9. 9.31) When a man 'marries' in the manner of a woman, a 'woman' about to renounce men, what does he wish, when sex has lost its significance; when the crime is one which it is not profitable to know; when Venus is changed into another form; when love is sought and not found? We order the statutes to arise, the laws to be armed with an avenging sword, that those infamous persons who are now, or who hereafter may be, guilty be subjected to exquisite punishment.²

The accuracy of Pharr's translation is questionable as the the word *porrigo* does not usually mean "renounce."³ A more correct translation of the opening would be: "When a man 'marries', [and is] about to offer [himself] to men in a womanly fashion . . ."⁴ The text classifies the person fulfilling the passive sexual role as a woman. The term marriage does not refer to a formal union though such relationships were mentioned in the works of both Juvenal⁵ and Martial.⁶ There is no existing written evidence of any anti-homosexual legislation in the twenty

¹ Sometimes incorrectly cited as Constantine who ruled from 307 - 337 A.D.

² Pharr 1952: 231-232.

³ Lewis 1916: 781.

⁴ Bailey 1975: 70-71.

⁵ *Sat.* 2.117 ff.

⁶ "Epigrams" 12.42.

years immediately prior to 342. The references to "laws" and "statutes" in the edict alludes to pre-Constantinian legislation which banned same sex acts. W. G. Holmes notes that the grammatical structure "almost suggests that it was enacted in a spirit of mocking complacency."⁷

In 390 A.D., Valentinian II, Theodosius, and Arcadius proposed a law which condemned the sexually passive man to be burned. This was the most common punishment for violators of sex crimes in the Middle Ages:⁸

COD. THEOD. 9.7.6: All person who have the shameful custom of condemning a man's body, acting the part of a woman's, to the sufferance of an alien sex (for they appear not to be different from women), shall expiate a crime of this kind in avenging flames in the sight of the people.⁹

A literal reading would lead one to believe that the law was aimed at the active sexual partner or those who prostituted men or boys for the service of others. The ambiguous phrase "shameful custom of condemning a man's body . . . to the sufferance of an alien sex" might have referred to the one who submitted to abuse. The literal interpretation seems the most sound.

⁷ Holmes Vol. 1 1912: 121.

⁸ Westermarck 1939: 372.

⁹ Pharr 1952: 232.

The historian Evagrius wrote that Emperor Anastatius I (491-518 A.D.) abolished a tax called the *chrysarguron*. Among those who had been previously taxed were "those who were devoted to a prostitution which outraged not only nature but the common weal."¹⁰ Evagrius, a Christian, dismissed the charge made by the historian Zosimus that Constantine had created the tax.¹¹ The abolishment of this tax was an important move against a hypocritical policy which for centuries created revenue for a government which preached against the sin of homosexual acts.

The sixth-century collection of Roman law, the *Corpus juris civilis*, was created under the patronage of the Emperor Justinian and included the death penalty prescribed by the 390 A.D. legislation. This collection is divided into four parts: the *Codex*, all valid imperial edicts since Hadrian, the *Digest*, a collection of writings of Roman jurists, the *Institutes*, abstracts of the other parts of the collections and a reference guide for law schools, and the *Novellae* or *Novels*, laws issued by Justinian and his successors. The *Codex*, *Digest*, and *Institutes* are in Latin, but the majority of *Novels* are in

¹⁰ *Hist. Eccl.* 3.39.

¹¹ *Hist. Eccl.* 3.40-41.

Greek. All four sections make some reference to homosexual acts but most are pederasty instead of sexual acts¹² between adults.¹³ The *lex Julia de adulteriis* which originally legislated against *stuprum* grew more detailed in its prohibitions through the interpretations of jurists. The process of interpretation is difficult to reconstruct. The subjects of the original law were: marriage, divorce, adultery, and *stuprum*. The most efficient review of basic law is the *Institutes* which stated that homosexual acts were to fall within the purview of the *lex Julia (ad legem Juliam de adulteriis et stupro)*.¹⁴ Justinian's *Institutes* were compiled by Tribonian and given legal authority in 529 A.D.:¹⁵

INST. 4.18.4: In criminal cases public prosecutions take place under various statutes, including the *Lex Julia de adulteriis* . . . which punishes with death (gladio), not only those who violate the marriages of others,¹⁶ but those who dare to commit acts of vile

¹² The debate over the meaning of sodomy is acknowledged and is presumed a general term for deviant sexual behavior.

¹³ For example, *Codex* 9.9 "Ad legem de adulteriis et de stupro"; *Digest* 18, v. 35.1 "Stuprum . . . puero"; *Institutes* 4.18.4; and *Novellae* 77 and 141, all from the *Corpus juris civilis*.

¹⁴ Bullough 1976: 333.

¹⁵ Bullough 1979: 32.

¹⁶ Paulus stated that those guilty of adultery under the *Lex Julia* had part of their property confiscated and were sent to an island (*Sent.* 2.26.14). This is similar to the punishment given for the non-violent seduction of a virgin or widow (*Inst.* 4.18.4). The introduction of capital punishment for adultery is attributed to Constantine (cf. *Cod. Justin.* 9.9.30).

lust with [other] men (*qui cum masculis nefandam libidinem exercere audent*).

There is no conclusive proof that the interpretative extensions of the Julian law and the Theodosian code were ever strictly enforced. Justinian felt it necessary to publish two *novellae* against deviant sexual behavior. The pious language and severe punishment have left a legacy of prejudice against homosexuality in Western culture, specifically in legal systems. The first *novellae* against homosexual acts and blasphemy was issued in 538. The following are excerpts:

Nov. 77: . . . since certain men, seized by diabolical incitement, practise among themselves the most disgraceful lusts, and act contrary to nature: we enjoin them to take heart the fear of God and the judgement to come, and to abstain from suchlike diabolical and unlawful lusts, so that they may not be visited by the just wrath of God on account of these impious acts, with the result that cities with all their inhabitants.¹⁷ For we are taught by the Holy scriptures that because of like impious conduct cities have indeed perished, together with the men in them . . . For we order the most illustrious prefect of the Capital to arrest those who persist in the aforesaid lawless and impious acts after they have been warned by us, and to inflict on them the extreme

¹⁷ This is a reference to the biblical story of the cities of Sodom and Gomorrah.

punishments, so that the city and the state may not come to harm by reason of such wicked deeds. And if, after this our warning, any be found who have concealed their crime, they shall likewise be condemned by the Lord God. And if the most illustrious prefect find any who have committed any such offence, and shall omit to punish them according to our laws, first, he will be liable to the judgement of God, and he will also incur our indignation.¹⁸

The second decree was issued six years later in 544 A.D. and addressed homosexual acts exclusively and in great detail. this is an excerpt of that legislation:

NOV. 141: Preamble: Though we stand always in need of the kindness and goodness of God, yet is this specially the case at this time, when in various ways we have provoked him to anger on account of the multitude of our sins. And although he has warned us, and has shown us clearly what we deserve because of our offences, yet he has acted mercifully towards and, awaiting our penitence, has reserved his wrath for other times - for he has "no pleasure in the death of the wicked; but that the wicked turn from his way and live". Wherefore it is not right that we should all despise God's abundant goodness, forbearance, and longsuffering kindness and, hardening our hearts and turning away from penitence, should heap upon ourselves wrath in the day of wrath. Rather, we ought to abstain from all base concerns and acts - and

¹⁸ Excerpted from Nov. 77, Bailey 1975: 74.

especially does this apply to such as have gone to decay through that abominable and impious conduct deservedly hated by God. We speak of the defilement of males (*de stupro masculorum*) which some men sacrilegiously and impiously dare to attempt, perpetrating vile acts with other men . . . God teaches us, in order that by means of legislation we may avert such an untoward fate. Again, we know what the blessed Apostle says about such things, and what laws¹⁹ our state enacts.²⁰

These two edicts were not the watershed legislation they have been commonly purported to be. Novella 77, was simply an imperial warning to those practicing homosexual acts to desist or be arrested and punished. Novella 141, issued during Lent, called for repentance and confession by homosexual practitioners. Those who did not refrain from such behavior were again threatened with legal action. Death is the implied penalty of the decree but Justinian castrated those found guilty of homosexual acts.²¹ It is possible that both were directed towards male prostitution, as a violation of public morality, but there is no conclusive evidence. In 521 A.D., two bishops, Isaiah of Rhodes

¹⁹ These are assumed to be the *Lex Julia*, extended by jurist interpretations, *Cod. Theodos.* 9.7.3., and *Nov.* 77.

²⁰ Excerpted from *Nov.* 141, Bailey 1975: 75.

²¹ Procopius, *Anecdota* 11.36, translated by: Dewing 1940.

and Alexander of Diospolis were found guilty of pederasty. Gibbon describes their punishment:

A painful death was inflicted by the amputation of the sinful instrument, or the insertion of sharp reeds into the pores and tubes of most exquisite sensibility; and Justinian defended the propriety of the execution, since the criminals would have lost their hands, had they been convicted of sacrilege. In this state of disgrace and agony, two bishops, Isaiah of Rhodes and Alexander of Diospolis, were dragged through the streets of Constantinople, while their brethren were admonished by the voice of a crier, to observe this awful lesson, and not to pollute the sanctity of their character. Perhaps these prelates were innocent. A sentence of death and infamy was often founded on the slight and suspicious evidence of a child or a servant . . . and pederasty became the crime of those to whom no crime could be imputed.²²

Gibbon incorrectly associated Justinian, who was not yet emperor, with this event. Procopius, Justinian's court historian (527-565 A.D.), created the "authorized" character of Justinian in the official histories he wrote. However, he also compiled an unofficial record which contained more of the unseemly aspects of imperial life. In this, Procopius alleged that charges of homosexual acts

²² Gibbon Vol. 4 1946: 1476.

were pressed against anyone who opposed the emperor or was a threat to the security of the throne.²³ Procopius' documentation was weak and he asserted that the prosecution against pederasts was:

Conducted in the most irregular fashion, since the penalty was imposed even where there was no accuser, and the word of a single man or boy, even if he happened to be a slave forced to give evidence most unwillingly against his owner, was accepted as final proof. Men convicted in this way were castrated and exposed to public ribaldry.²⁴

The only example offered by Procopius concerned a discourteous remark made by Vasianus against the Empress Theodora, wife of Justinian. For this, Theodora charged him with "offences against boys."

The officer soon had the man out of the church and tortured him with an unendurable form of punishment. When the people saw a member of the upper classes who had been surrounded with luxury all his life overwhelmed with such agonies, they were immediately cut to the heart, and their groans and shrieks rose to high heaven as they pleaded for the young man. But Theodora made his punishment even worse; she had his privy member cut off and

²³ Procopius, *Anecdota* 11.36.

²⁴ Procopius, *Anecdota* 11.36.

destroyed, although he had never been brought to trial, and finished by confiscating his estate for the Treasury.²⁵

The necessity of Justinian's laws is based upon the belief that homosexual acts endangered the state by, according to the scriptures, provoking the wrath of God. It was the responsibility of the leader to protect the people from this by creating legislation which punished such unholy conduct. However, the Christian Emperor called for the sinner to repent and avoid civil recrimination. It appears that the Christian goal of salvation overrode any sadistic desire to enforce the extreme penalties of the law.

Natural disasters and plague, including the one which devastated Constantinople in 544 A.D., appeared prophetic to the Christian emperor. Homosexuals were scapegoats for a populous clamoring for protection from the famines, floods, and earthquakes which fell outside the emperor's worldly control. The prophet Ezekiel was quoted in Novella 141: "As I Live . . . I have no pleasure in the death of the wicked turn from his way and live". The Justinian legislation of morality was an inclusive attempt to bring people into the church through civil statute. Christians believed that same sex acts were pagan

²⁵ Procopius, *Anecdota* 16.20.

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practices which had contributed to the downfall of ancient Rome.

In Closing . . .

W. H. Auden said, "When shall we learn, what should be clear as day, We cannot choose what we are free to love?"¹ The desire to express one's "freedom" is constrained by social prescription. Laws indicate the values and behavior of a community because they are the means by which a community defines and manages deviance. The bridge between contemporary values and ancient laws is undeniable.

Western Europe has been built upon the ruins of ancient Rome. The nations which have risen upon this foundation reflect a Roman influence in their cultures and the laws which govern them. The tolerant attitude of ancient Romans towards homosexual acts has not survived into the modern era. Roman law was designed to preserve the integrity of the social structure by the prohibition of acts which cast a shadow of *stuprum*. The purpose of this thesis is to recognize that acceptable sexual behavior in pre-Christian, Roman law was not based upon the gender of the participants but their status. Christian emperors created legislation which specifically recognized

¹ Auden, W. H. 1976: 256.

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homosexual acts as criminal. In the race to distance ourselves from the pagan past we have lost a degree of humanity. The toleration which exemplified early Roman law has yet to enjoy a renaissance.

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